7

Office - Supreme Court, U.
FILED
MAY 20 1953
HAROLD B. WILLEY, Cl

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 83

PALACE CORPORATION,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

LEO FIXLER,
Counsel for Petitioner.

INDEX

Subject Index

Page

1. Opinion in Court below.....R. 99
2. Grounds upon which Jurisdiction is Invoked..... 2
3. Statement of Case..... 1, 2
4. Questions Presented 3
5. Reasons for Allowance of Writ..... 3, 4
6. Petitioner's Brief and Argument..... 5-13
   - A. The Standard Disputes Clause, Article 15 was not intended to apply to the issues presented by Counts I, III, IV and V of the Complaint 5
   - B. Summary judgment should not be granted when its effect is to deprive a party of the right to have the actions of an administrative officer reviewed by a Court specifically empowered by Congress to make that review on the merits 12

Table of Cases Cited

Associated Press v. *U. S.*, 326 U. S. 1.....5, R. 63
Barlow v. *U. S.*, 35 Ct. Clms. 514.....5, R. 60
Bell Aircraft Corp. v. *U. S.*, 343 U. S. 913.....R. 59
Binghamton Construction Co. v. *U. S.*, 107 Fed. Sup. 712 6
Blood v. *Fleming*, 161 Fed. (2), 292.....R. 60
Cramp Shipbuilding Co. v. *U. S.*, 122 Ct. Clms. 72.. 6
Diamond v. *U. S.*, 98 Ct. Clms. 543.....R. 62
Howard P. Foley v. *U. S.*, 105 Ct. Clms. 161 (dissent. op.) 7
Fuller v. *U. S.*, 105 Fed. Supp. 837.....7, R. 62
George H. Evans & Co. v. *U. S.*, 74 Fed. Sup. 58..7, R. 62
General Steel Products Corp. v. *U. S.*, 36 Fed. Sup. 498 6
Great Lakes Dredge & Dock Co. v. *U. S.*, 119 Ct. Clms. 504, Cert. Den. 342 U. S. 953.....6, R. 61

1234 mobile expansible houses, the other, covering their transportation, erection and installation at various Government sites.

Count I alleges a wrongful withholding of $32,504.26 of the contract price which Respondent retained "* * * for the correction of moisture conditions in mobile units whatever the cause" (R. 2, 16), under a one year guaranty clause (R. 10).

Count V, closely related, seeks to recover $56,477.21 expended by Petitioner to make certain roof repairs directed by Respondent and upon its unilateral determination that it was Petitioner's responsibility to make them under that guaranty.

Count III seeks extra costs of $78,404.96 because of extraneous conditions encountered in the performance of the erection and installation of the units.

Count IV seeks damages for delays and in changing sites.

Respondent's motion for summary judgment was granted as to Counts I, III, IV and V but denied as to Count II.

On the ground that only fact questions are presented in Counts I, III, IV and V, the Court below has granted Respondent's motion for summary judgment because of the standard disputes clause (R. 102) and the absence of any allegation of fraud.

Statutes Involved

U. S. Constitution, Article III, Section 2.

Defense Appropriation Act of 1953, Title VI, Section 635.

Jurisdiction to Review

Jurisdiction of this Court is invoked under Title 28 U. S. Code, Sections 1255(1), 1651 (a) and 2101 (c). The judgment of the Court of Claims of the United States was entered on March 3rd, 1953 (R. 99).

Questions Presented

Whether, as held below, the claims herein involve only fact questions controlled by the standard disputes clause (R. 102) so that, by reason of the contracting officer's adverse decision, Petitioner may not have a trial on the merits.

Reasons Relied Upon for Allowance of Writ

The Court below has, in effect, said that it is precluded from passing upon the merits of Petitioner's claims as only fact questions are presented, and since fraud is not alleged, the decision of the contracting officer, affirmed by the Head of the Department, is final.

In U. S. *v.* Wunderlich, 342 U. S. 98, the parties stipulated that the question decided by the Department Head was one of fact. That is not the situation here.

It is respectfully submitted that here, among other things, the claims involve the interpretation of the warranty clause. The record will reveal that the contracting officer charged Petitioner with a responsibility under the guaranty provision upon the theory of liability foreign to its language and intent.

Petitioner is entitled to a trial on the merits for—

(*a*) The claims present questions of law.

(*b*) It was never intended that the standard disputes clause apply to the guaranty provision.

(*c*) It was never intended that the contracting officer, by reason of Article 15, be designated the sole and exclusive judge of Petitioner's claims against the Government for its breach of contract.

(*d*) The Government has never accounted to plaintiff for the funds withheld under Count I.

(*e*) Recent enactments of Congress (Defense Appropriation Act of 1953, Title VI, Section 635) reflect an intent to the effect that contractor's claims against the

Government be heard by the Court on the merits and are not to be summarily disposed of on the ground that the contracting officer's decision is final under Article 15.

(*f*) The matter is of vital public importance as many contractors hold similar contracts with the Government and will be bound by this determination.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Court of Claims of the United States sitting at Washington, D. C., commending said Court of Claims to certify and send up to this Court on a date to be designated, a full and complete transcript of the Record of all proceedings in said Court of Claims heretofore had in this case to the end that this case may be reviewed and determined by this Court; that the judgment of the Court of Claims insofar as indicated be reversed; and that your Petitioner be granted such other and further relief as may seem proper.

PALACE CORPORATION, *Petitioner,*
LEO FIXLER,
Counsel for Petitioner.

PETITIONER'S BRIEF

A

The Standard Disputes Clause Does Not Apply to the Claims Set Forth in the Complaint

The Court below said "These various claims which we have discussed turn over issues of fact." It concluded that, by reason of the standard disputes article (R. 102), the decision of the Head of the agency, adverse to Petitioner, was final (R. 102) under the authority of *U. S.* v. *Wunderlich,* 342 U. S. 98.

Ordinarily, a motion for summary judgment must be denied where a genuine issue of fact is present. *Associated Press* v. *U. S.,* 326 U. S. 1, 6. But this is not the ordinary case. Here, we deal not so much with the merits of the controversy, but rather, with the question as to the character of the claims, and whether, as a matter of law, they fall under the disputes article to the extent that Petitioner is precluded from having the merits thereof passed upon by the Court.

In the Wunderlich case, *supra,* the parties stipulated that the dispute, decided by the Department Head, was one of fact. In the case at bar, Petitioner contends that the claims involve questions of law, and mixed questions of law and fact, and that, in any event, the issues involved are outside the scope of the disputed article.

The disputes article was intended to prevent interruption in the progress of the work. *Barlow* v. *U. S.,* 35 Ct. Cls. 514.

But, when the work called for under the contract is completed, inspected and accepted, the disputes article having served its purpose, is no longer relevant.

The nature and extent of Petitioner's subsequent liability under a guaranty, presents an entirely different independent problem. So too, is the question of Respondent's liability for any breach of the agreement.

It is respectfully submitted that the Court below has overlooked these distinctions as well as the intent of Congress recently expressed and discussed below.

The Wunderlich case, *supra,* did not alter the rule previously established, that questions of contract interpretation involve issues of law. *U. S.* v. *Moorman,* 338 U. S. 457.

In the Moorman case, this Court said: "The oft repeated conclusion of the Court of Claims that questions of 'interpretation' are not questions of fact is ample reason why the parties to the contract should provide for final determination of such disputes by a method wholly separate from the fact—limited provisions of Section 15."

The Court below usually adheres to that rule.

In *Cramp Shipbuilding Co.* v. *U. S.,* 122 Ct. of Cls. 72, it said: "The question of the retention of discounts * * * was not a 'matter of fact' * * *". "It was a question of the interpretation of a written document, commonly called a question of law."

A similar distinction was made in *Pottsville Casting & Machine Shops* v. *U. S.,* 121 Ct. of Cls., 129. *McWilliams* v. *U. S.,* 118 Ct. of Cls., 1, and *Binghamton Construction Co.* v. *U. S.,* 107 Fed. Sup. 712.

The Court below previously held that a contractor's claim for damages for delays, was one of law outside the disputes articles. *Langevin* v. *U. S.,* 100 Ct. of Cls. 15.

In *Great Lakes Dredge & Dock Co.* v. *U. S.,* 119 Ct. of Cls., 504 (cert. den. 342 U. S. 953), it was held that a contractor was not precluded by the findings of the contracting Officer with respect to extra costs attributable to changed conditions.

Citing *General Steel Products Corp.* v. *U. S.,* 36 F. Supp. 498 and *U. S.* v. *Iovacchini Bros., Inc.,* 116 F. (2nd) 345, *Williston on Contracts,* Rev'd Ed. Vol. 9, Sec. 292, n. 4, says: "But the question as to the measure of damages in a breach of contract is a question of law upon which the court is authorized to decide."

In *Fuller* v. *U. S.*, 108 Ct. of Cls. 70, it was held that claims for extra costs for unreasonable delays due to the actions of the Government, are in effect claims for damages for breach of contract outside the disputes clause.

It is respectfully submitted that the dissenting opinion in the case of *Howard P. Foley* v. *U. S.*, 105 Ct. of Cls. 161, is applicable for in the case at bar, the Government issued notices to proceed, cancelled some, and by its failure to have sites ready, put the Petitioner to considerable extra expense. Furthermore, if Petitioner had not thus been delayed, the units would have been erected soon after their manufacture and, the guaranty of one year, which began from the date of erection rather than the date of manufacture, would have expired much sooner.

Although it denied relief to the claimant in the case of *George H. Evans & Co.* v. *U. S.*, 74 Fed. Sup. 58, the Court below did approve the following rule: "It is true that what has been called a 'constructive condition of cooperation' (Patterson Constructive Conditions in Contracts, 42 Columbia Law Review 903) should be read into the Government contract in this case and under it, 'neither party will hinder the other in his discharge of the obligations imposed upon him nor increase his cost of performance'."

In *Parrish* v. *U. S.*, 120 Ct. of Cls. 100, the distinction was made between instances of delay resulting from some want of diligence on the Government's part as in Fuller *v.* U. S., *supra,* and delays resulting from the exercise by the Government of some right reserved in the contract, as in *Stafford* v. *U. S.*, 109 Ct. of Cls. 479.

In the Parrish case, the contractor had proceeded at his own risk and had been fully compensated at the contract price. In the case at bar, the Government caused the Petitioner to perform services inconsistent with any contract right reserved, and thus, those acts may be characterized as wilful as in *James Stewart & Co.* v. *U. S.*, 105 Ct. of Cls. 285.

While it is not intended in this brief to argue the merits of the entire case, it is necessary to partially discuss them, so that this Honorable Court may observe from their nature and character that they involve questions of law.

As stated above, Counts I and V are related. The Government's right to withhold the $32,504.26 claimed in Count I depends upon the meaning and intent of the guaranty.

Under Count V, the question arises as to whether the expenditure by Petitioner of $56,477.21, made upon Respondent's insistence, was its responsibility under the guaranty in the first instance.

The materials first suggested by Petitioner for the manufacture of the roof of this mobile unit were unavailable because of the emergency. Respondent insisted that cotton membrane be used. The original pilot model had #55 rolled roofing nailed and cemented to the roof sheathing covered with asphalt. When the Government insisted upon a different method, Petitioner requested an alternate provision and Section 12 of the specifications so provide (Ex. "9", R. 77).

Petitioner's roof specification for over 4,000 units manufactured for the Government under prior contracts, developed few roof leaks. The subject contracts were executed under the *Lanham Act,* 42 U. S. C. A. Section 1521(b), which expressly authorized the building of temporary emergency housing to be removed within two years after the end of the emergency, and to be designed to consume minimum amounts of critical materials and standard equipment. For these reasons, substitute materials readily available were specified and the usual performance guaranty was omitted. Petitioner's responsibility was limited to correcting defective material and improper workmanship as therein specified (Petition, Par. 29).

The Respondent says that Petitioner designed this unit. This, Petitioner denies. That is one of the material questions to be resolved.

As early as August 1944, the Government recognized that the roof specifications were defective (Ex. "5", R. 71). Mr. Schwartz, the successor contracting officer, requested an estimate on new roof specifications. A few days later, he withdrew that request and submitted other roof specifications (Ex. "18", R. 93).

The Government's confusion is understandable because their insistence upon the use of Osnaberg cloth for the roof was a mistake and could not be corrected. That is why a subsequent contract issued to Petitioner for the same unit to be delivered in Washington, D. C., had different roof specifications (Ex. "5", R. 71) (Ex. "16", R. 89).

There were undoubtedly conditions which required attention. But the responsibility to make and pay for their repair is a question requiring the interpretation of the guaranty clause in light of the circumstances under which it was authorized by the Government.

In a letter dated January 19th, 1945 (R. 22), discussing the warranty clause, Mr. Schwartz takes issue with Petitioner's contention that moisture caused by condensation was not a condition which fell under it. In that same letter, he states that the guaranty "whether written or implied insures our receiving a habitable dwelling, an article for its intended use." Mr. Schwartz concludes by saying that it was Petitioner's "apparently defective design to which the difficulties were attributable".

As previously stated, Petitioner denies that it designed this unit or that it prescribed the roof specifications (R. 26).

Thus, not only was Petitioner held responsible under an erroneous interpretation of the written guaranty but liable as well for the breach of an alleged "implied" guaranty. Similarly, the withholding of approximately $68,000.00 "for the correction of moisture conditions in mobile units, whatever the cause" (R. 16), was without legal justification.

The so-called "moisture condition" was found to exist not only in these temporary units built of substitute materials, but in permanent housing as well. This statement is from the report of Respondent's Technical Division after comprehensive investigation. In that report, the Technical Division says "Where trouble from condensation has developed, the faulty design or workmanship could not be readily detected. The influence of the various details of construction on condensation is difficult to evaluate and oftentimes simply guess work" (R. 54).

With respect to Petitioner's units, they recommended that the guaranty clause be revised to protect the Government not only from damages resulting from faulty roof construction *but condensation as well. Interlineation supplied* (R. 54, 55).

But condensation and its effects was not Petitioner's responsibility.

Based upon his own opinion as to the nature and extent of Petitioner's responsibility under the guaranty, Mr. Schwartz withheld approximately $68,000.00 (Ex. "15", R. 88). Upon appeal to Mr. Seaver, the Assistant Commissioner, this was reduced to $32,504.26, the amount sued for under Count I. Commissioner Seaver concluded that there was a basis for withholding monies for materials furnished and work performed not in accordance with the contract requirements. While a schedule of repairs to be made was submitted to Petitioner, at no time was it supplied with a break-down of the alleged defective materials or the respects in which the workmanship was defective. Nor to this date has Petitioner been apprised as to where and how that money was expended.

In a letter dated January 28, 1946, Commissioner Klutznik reviewed Mr. Seaver's determination and said: "With particular reference to your discussion of roof leaks and condensation * * * I find that Mr. Seaver found * * * that Palace Corporation was liable only in those instances where unquestionable roof leaks were involved

and where condensation was not a contributing factor. Further, I find that conditions on DC-49104 were not the same as in MICH-20213. In DC 49104, an entirely different roof was specified and installed" (R. 55).

Petitioner agrees that a different roof was specified for the DC project and the reasons therefore appear above. But, evidently, Commissioner Klutznik was not familiar with the report filed by his own Technical Staff and their conclusion that "Condensation, however, appears to be a contributing factor" (R. 56).

Moreover, he overlooked the fact that funds were withheld "* * * * for correction of moisture conditions in mobile units, whatever the cause" (R. 16, 28), and this, the Technical Staff say is guess work.

It is also obvious that if Mr. Schwartz was approximately 50% wrong in withholding $68,000.00 for the correction of moisture conditions not Petitioner's responsibility, having been reversed by Assistant Commissioner Seaver to that extent, he was just as wrong in forcing Petitioner to spend approximately $56,000.00 to correct the same conditions attributable to the same causes (Count V).

We believe the rule to be that it is Respondent's burden to affirmatively establish that the decisions of the Head of the Department concern fact questions rather than disputes as to the law. *U. S.* v. *Johnson,* 119 Ct. of Cls. 707.

If a contracting officer is presumed to have authority to pass upon a contractor's responsibility under a guaranty intended to be limited in its application for the reasons expressed herein, it is doubtful that anyone would accept a Government contract under those circumstances for, it would be impossible ever to know the nature and extent of one's ultimate liability. While it appears to this writer, that the situation falls directly within the observations of Mr. Justice Douglas in the Wunderlich case, we do not go that far. Petitioner asks

that it be given an opportunity to have the question of the extent of its liability under the guaranty clause, if any, determined by the Court on the merits and not in the unilateral fashion exhibited here, without any opportunity afforded Petitioner of checking upon Mr. Schwartz's facts and figures.

It is evident that while the guaranty says one thing, the contracting officer decided Petitioner's responsibility upon his own theory of liability. Petitioner does not say that the contracting officer was guilty of fraud nor is it intended to characterize his actions as being dishonest. Petitioner, however, does say that his interpretation of Petitioner's liability was completely erroneous, and what is more important, the question of its liability is not one which falls within the scope of Article 15.

B

After this Court's decision in the Wunderlich case, *supra,* several bills were introduced in Congress to grant to the Court of Claims jurisdiction to review decisions of contracting officers as to questions of fact. None has as yet, been passed. However, the intent of Congress has recently been expressed in the Act of July 10th, 1952, known as the Department of Defense Appropriation Act of 1953, Title VI, Section 635, which provides in part:

"No funds contained in this article shall be used for the purpose of entering into contracts containing Article 15 of the standard contract until and unless said article is revised and amended to provide an appeal by the contractor to the Court of Claims within 90 days of the date of decision by the Department concerned, authority for which appeal is hereby granted."

Perhaps with this statement of intent by Congress, this Honorable Court may be inclined to re-consider its holding in the Wunderlich case.

In conclusion, we respectfully urge that for the reasons set forth above, Petitioner should be given its day in Court and not summarily deprived of that right because of a unilateral determination of a layman as to the meaning and intent of the guaranty and the nature and extent of Petitioner's liability thereunder.

Respectfully submitted,

LEO FIXLER,
Counsel for Petitioner.

(8325)